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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-7

ROBERT ERVIN DELPH, JR.
AND JOHN FRANK TAYLOR,

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Petitioners Delph and Taylor take issue with the Brief for the United States in Opposition on three grounds:

1) Facts are misrepresented;
2) Petitioners'arguments are misapprehended; and
3) The holding below is disregarded.

1. FACTS ARE MISREPRESENTED.

The government's creative approach to the facts of this case artifically enhances its argument in support of the convictions. Without the corrections undertaken below, it does indeed appear that petitioners Delph and Taylor were involved in diverse criminal activities for a substantial period of time and that their co-defendant J.C. Hawkins was an essential participant in each activity. These arguments collapse when the record is accurately analyzed.

A. Brief in Opposition, p. 6

(2) Between 1971 and 1974, J.C. Hawkins supplied approximately 200 counterfeit automobile titles to petitioners Taylor and Delph, who sold them to a car theft ring (Tr. 1030-1037, 1051-1052, 1150-1151, 1227-1237, 1272, 1274).

Evidence at Trial

Delph was connected with sales of titles to the car theft ring from early 1972 until mid 1973 (Tr. 1033, 1150, 1227-8, 1230). Taylor was similarly connected during the same period (same Tr. pages) and, by one witness, until mid 1974 (Tr. 1033). No evidence was introduced as to

Delph and Taylor concerning events prior to early 1972.

No support for use of the "200" figure can be found on the pages cited. Elsewhere in the evidence, it is shown that a total of only 200 titles was printed after which the plates were destroyed (Tr. 860-1). A number of these counterfeit documents were distributed through other channels not involving Delph or Taylor (e.g. Tr. 949, 973, 1082, 1214, 966, 969, 981, 1533).

Three of the pages cited by the government in this paragraph (Tr. 1035, 1036 and 1037) do not relate to this evidence at all. Rather, these pages contain the transcript of a bench conference concerning highly inflamatory and unreliable evidence which the government was prevented from introducing by a correct ruling of the trial court.

B. Brief in Opposition, p. 7

(4) In April 1972, petitioner J.C. Hawkins, assisted by Recea Hawkins, concealed and sold part of a 33,000 pound shipment of Hormel meat that had been stolen from a truck driven by petitioner Delph (Tr. 229-234, 609-613, 675-676, 684-690, 701-707). Petitioners Delph and Taylor also offered to sell some of the stolen

meat to Kenneth Boyd, who had previously purchased counterfeit automobile titles from them (Tr. 1252-1253, 1262-1263).

Evidence at Trial

The effort to show involvement by either Delph or Taylor in this transaction is wholly unsupported by the evidence. Delph's employment to drive the truck from which the meat was stolen occurred five to fifteen months prior to the theft (Tr. 676). Testimony was elicited that Delph and Taylor, on separate occasions, offered to sell meat to the person named (Tr. 1252-3, 1263). Such meat was never described as stolen. Further, that offered by Delph was specifically identified as swinging beef (Tr. 1252-3) whereas the theft under discussion involved boxed beef (Tr. 232, 612, 701). This distinction was noted by the court below (78-7; p. A6, fn.3).

C. Brief in Opposition, p. 8

(d) During the fall of 1973, two individuals who had purchased counterfeit car titles from petitioners Taylor and Delph agreed to go to Mexico for J.C. Hawkins to obtain cocaine and heroin (Tr. 1187-1190).

Evidence at Trial

J.C. Hawkins was never mentioned in connection with this transaction and the only one of the defedants connected thereto was Taylor (Tr. 1187-95).

D. Brief in Opposition, p. 9

Petitioner J.C. Hawkins, with the assistance of his brother, petitioner Recea Hawkins, was personally involved in each of the criminal activities.

Evidence at Trial

Evidence was introduced concerning a number of criminal transactions to which Hawkins was never connected. (e.g. Brief in Opp. p.8, paragraph (c) and (d), Tr. 1929).

E. Brief in Opposition, p. 13

The involvement of petitioners Delph and Taylor in these activities recurred throughout the length of the conspiracy.

Evidence at Trial

The time periods discussed in connection with numbered paragraph 2 of the government's brief is the only period during which criminal

activity or association with co-defendants was shown on the part of Delph or Taylor. The alledged conspiracy lasted from December 1970 to April 1976 (Brief in Opp., p. 608). Asserting that a 1½ year (Delph) or 2½ year (Taylor) involvement shows participation "throughout the length of [a 5½ year] conspiracy," so far exaggerates the evidence as to exceed the bounds of adversarial license.

2. PETITIONERS' ARGUMENTS ARE MISAPPREHENDED

The discussion beginning at page 11 and continuing to page 12 of the Brief in Opposition is irrelevant to the contentions of petitioners. Petitioners did not claim to have been convicted of substantive offenses on a theory of vicarious liability. Petitioners did argue that "the doctrine of multiple conspiracy is a concomitant of the proposition that a conspirator may not be held vicariously liable for criminal acts outside the scope of his agreement." (78-7, p.9) In other words, when one defendant is joined with others for trial under a single conspiracy count and evidence is introduced as to those others' participation in unrelated conspiracies, the prejudice accruing to the first defendant may not be justified on a theory of vicarious

liability. Evidence of the criminal conduct of the co-defendant would be proper only if it fell within the scope of the agreement entered into by the first defendant and thus was pursuant to a single conspiracy.

At pages 14 and 15 of the United States Brief in Opposition, petitioners' argument concerning the jury instruction is misinterpreted. Petitioners did not contend that the Fifth Circuit held that RICO conspirators must be found to have committed two or more acts of racketeering. Rather, petitioners argument was addressed to the failure of the trial court to instruct the jury that RICO conspirators must have agreed to participate in the affairs of an enterprise through the commission of two or more such acts. Thus the government's analysis of this part of the holding below is correct; but this does not answer petitioner's argument that this criterion was not communicated to the trial jury.

3. THE HOLDING BELOW IS DISREGARDED

In its Brief of Opposition, the government endeavors to justify the decision below on a different basis from that employed by the Fifth Circuit. The government argues that the convictions were proper under Kotteakos, 328 U.S.

750 (Brief in Opp. p.11). The government refuses to accept the fact that the Fifth Circuit expressly denied the applicability of Kotteakos to RICO conspiracies:

> . . . RICO has displaced many of the legal precepts traditionally applied to concerted criminal activity. Its effect in this case is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes.
>
> (78-7, p.A-36)

The apparant inability of the United States to defend this holding which it elicited from the Court of Appeals is strong reason for the grant of certiorari. Should the petition be denied, the government will be freed, for a time, of the obligation to defend the holding -- it may merely cite it.

Respectfully submitted,

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